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# "But for the Grace of God There Go I": Justice Thomas and the Little Guy

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**"BUT FOR THE GRACE OF GOD  
THERE GO I":  
JUSTICE THOMAS AND  
THE LITTLE GUY**

**Nicole Stelle Garnett\***

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During his confirmation hearings, then-Judge Clarence Thomas described watching, through his chamber's window, as shackled prisoners were led into the federal courthouse. "I say to myself almost every day," he introspectively reflected, "'But for the Grace of God

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\* Professor of Law, Notre Dame Law School and law clerk to Justice Thomas, 1998-99. This essay was prepared for the New York University Journal of Law & Liberty's symposium on the "Unknown Justice Thomas." I am indebted to Lou DeFra, Rick Garnett, Rick Pildes, and Stephen Smith for helpful comments and to Justice Clarence Thomas for teaching me, by word and example, to always respect the little guy.

there go I.”<sup>1</sup> In the intervening years, more than one commentator has accused Justice Thomas of reneging on his implicit promise—embedded in his self-identification with the prisoners—to look out for the little guy. According to these critics, Thomas has turned out to be anything but empathetic to the plight of the downtrodden. This view—that Thomas exhibits a disregard, even contempt, for the difficulties facing the least fortunate among us—pervades the popular imagination. He has been accused of forgetting his humble roots, of turning his back on his own people, and even of being a self-hating black man.<sup>2</sup>

These criticisms reflect a profound misunderstanding of Justice Thomas and his jurisprudence. There is a reason why Thomas, upon his nomination to the Supreme Court, first thanked his grandparents and the Franciscan nuns who educated him in Savannah’s segregated Catholic schools: he sincerely believed that, without their intervention—or, perhaps more accurately, without God’s intervention through them—he might well have arrived at a federal court house via a prison transport bus rather than the Yale Law School and the Senate Judiciary Committee. And, contrary to the view of critics who believe that his emphasis on his humble roots in the months following his nomination reflected a contrived “Pinpoint Strategy” to secure confirmation,<sup>3</sup> he continues to believe it. He understands the role

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<sup>1</sup> Nomination of Judge Clarence Thomas to Be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 102d Cong. 260 (1991).

<sup>2</sup> See, e.g., KEVIN MERIDA & MICHAEL A. FLETCHER, *SUPREME DISCOMFORT: THE DIVIDED SOUL OF CLARENCE THOMAS* 15–34 (2007); A. Leon Higginbotham, Jr., *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005 (1992); Eric L. Muller, *Where, But for the Grace of God, Goes He? The Search for Empathy in the Criminal Jurisprudence of Clarence Thomas*, 15 CONST. COMMENT. 225 (1998); Michael deHaven Newsom, *Clarence Thomas, Victim? Perhaps, and Victimizer? Yes – A Study in Social and Racial Alienation from African-Americans*, 48 ST. LOUIS U. L.J. 327 (2004); Statement by Charles E. Daye, Marilyn V. Yarbrough, John O. Calmore, Adrienne D. Davis & Kevin V. Haynes, African-Am. Faculty of the UNC Sch. of Law on The Visit of Justice Clarence Thomas (Feb. 28, 2002), available at [http://w3.uchastings.edu/wingate/PDF/African-American/Thomas\\_Final.pdf](http://w3.uchastings.edu/wingate/PDF/African-American/Thomas_Final.pdf).

<sup>3</sup> MERIDA & FLETCHER, *supra* note 22 at 174.

that Providence played in his remarkable rise from the sewage-filled streets of a Savannah ghetto to the highest court in the land.<sup>4</sup>

In his years on the Supreme Court, Justice Thomas's generosity has become increasingly difficult to ignore. Even his critics grudgingly have begun to acknowledge his personal efforts to help "the little guy"—from his decision to raise his sister's grandson, to his practice of welcoming groups of poor and predominantly minority school children to the Court, to his record of mentoring young people, to his involvement in a scholarship program that sends first-generation professionals to New York University School of Law on a race-blind basis.<sup>5</sup> But critics often overlook the evidence that Justice Thomas the jurist, not just Clarence Thomas the humanitarian, has never forgotten whence he came. Tucked in misunderstood corners of his opinions is proof—as undeniable as it is underappreciated—that he harbors a profound faith in and a desire to empower people like those that he left behind. As he poignantly asserted in his controversial 1998 speech to the National Bar Association, "All the sacrifice, all the long hours of preparation were to help, not to hurt."<sup>6</sup>

Justice Thomas's opinions are replete with expressions of concern for the metaphorical "little guy." But these expressions are frequently overlooked or misconstrued, in large part because Thomas's views about how to help the poor, the marginalized, and (perhaps especially) racial minorities are profoundly contrarian, at least as measured against prevailing elite sentiments. But properly understood—that is, understood in the context of Thomas's history and teleology—the evidence of his attentiveness to the underdog is undeniable. This essay seeks to set the record straight by situating opinions reflecting that attentiveness in the context of that history and teleology. I do not make these observations to prove the wisdom of Justice Thomas's views on the merits—

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<sup>4</sup> CLARENCE THOMAS, *MY GRANDFATHER'S SON: A MEMOIR*, 6–7 (2007) (describing the Savannah neighborhood where he lived as a young child: "I'll never forget the sickening stench of the raw sewage that seeped and sometimes poured from the broken sewer line.").

<sup>5</sup> KEN FOSKETT, *JUDGING THOMAS* 300–05 (2004); JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 108 (2007).

<sup>6</sup> Justice Clarence Thomas, Speech to the National Bar Association (July 28, 1998), available at <http://teachingamericanhistory.org/library/index.asp?document=507>.

although, in the interest of full disclosure, I tend to share his priors. Nor should my reflections be interpreted as evidence that he is, as some have claimed,<sup>7</sup> a results-oriented jurist. That Justice Thomas's expressed constitutional commitments are both genuine and self-binding is, in my view, established in an undeniable record of reaching conclusions that run counter to his personal preferences.<sup>8</sup> Also, I think it important to note, Justice Thomas himself has spoken on the subject of how a judge best serves the "little guy" and his view reflects more closely the themes set forth in Judge Robert Smith's contribution to this symposium than in mine. As Thomas explains, "A judge must get the decision right because, when all is said and done, the little guy, the average person, the people of Pinpoint, the real people of America will be affected not only by what we as judges do, but by the way we do our jobs."<sup>9</sup>

### I. RESPECT AND EMPOWERMENT

Opinions reflecting Thomas's concern for "the little guy" contain at least three overlapping themes. The first is an unwavering respect for and faith in the competence and ingenuity of all people, regardless of race or station. Justice Thomas harbors a profound and optimistic confidence in the meritocratic promise of America. He is a member of the Horatio Alger Association, a group of "self-made" individuals who are recognized for

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<sup>7</sup> See, e.g., Michael A. Fletcher & Kevin Merida, *In Sharp Divide on Judicial Partisanship, Thomas is Exhibit A*, WASH. Post, Oct. 11, 2004 at A11; Anthony Lewis, *Justices on a Mission*, N.Y. TIMES, June 30, 1997; Geoffery Stone, *McCain's Justice: Conservative Activism Gone Wild*, CHI. TRIB., May 7, 2008; Cass R. Sunstein, *The Myth of the Balanced Court*, AM. PROSPECT, Sept. 13, 2007.

<sup>8</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Thomas, J., dissenting) ("I write separately to note that the law before the Court today is uncommonly silly. If I were a member of the Texas legislature, I would vote to repeal it. . . . Notwithstanding this, I recognize that, as a Member of this Court I am not empowered to help petitioners and others similarly situated.") (internal quotation marks, citations, and ellipses omitted); *Bennis v. Michigan*, 516 U.S. 442, 454 (1996) (Thomas, J., concurring) ("This case is ultimately a reminder that the Federal Constitution does not prohibit everything that is intensely undesirable."); *Hudson v. McMillian*, 503 U.S. 1, 28 (1992) (Thomas, J., dissenting) ("Abusive behavior by prison guards is deplorable conduct that properly evokes outrage and contempt. But that does not mean that it is invariably unconstitutional.").

<sup>9</sup> See THOMAS, *supra* note 4, at 235.

"demonstrat[ing] individual initiative and a commitment to excellence; as exemplified by remarkable achievements accomplished through honesty, hard work, self-reliance and perseverance over adversity."<sup>10</sup> His membership—hardly surprising in light of his own Horatio Alger-esque story—is not a mere honorific for Thomas. Rather, the Association's commitment to empowering the disadvantaged and belief in the transformative power of hard work embody his core principles. For example, visitors to Justice Thomas's chambers will find, on a shelf near his desk, a bronze bust of his grandfather, Myers Anderson. The base of the bust is inscribed with a quotation, which the Justice will explain that he heard *ad nauseam* from Anderson growing up: "Old Man Can't is dead. I helped bury him."<sup>11</sup>

The second theme is a distrust of many social programs favored by intellectual elites. Justice Thomas's disdain for affirmative action is well known and the subject of scathing criticism.<sup>12</sup> He received equally scornful treatment for his criticism of welfare and other Great Society programs during the confirmation process.<sup>13</sup> Since these programs ostensibly aim to help the disadvantaged, Thomas's rejection of them is frequently interpreted as reflecting either callousness, naïveté, or both. But what is often misunderstood is *why* he holds these unpopular views. Thomas is acutely aware of historical lessons suggesting that government actions ostensibly designed to help sometimes mask illicit motives, and he believes that even well-meaning meddling can make things worse. Moreover, Thomas worries about the instrumentalization of poor people. He is deeply suspicious of "experimental" programs that aim to improve the plight of the poor and, especially, racial minorities, as well as what he views as "window dressing" efforts that enable

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<sup>10</sup> Horatio Alger Association of Distinguished Americans, Inc., About the Horatio Alger Association, <http://www.horatioalger.com/aboutus.cfm> (last visited July 27, 2009).

<sup>11</sup> Cf. THOMAS, *supra* note 44, at 13 (citing the adage as: "Old Man Can't is dead—I helped bury him.").

<sup>12</sup> See, e.g., Maureen Dowd, *Could Thomas Be Right?*, N.Y. TIMES, June 25, 2003, at A25; Sheryl McCarthy, *How Dare Justice Thomas Dissent on This One*, NEWSDAY, June 26, 2003, at A40.

<sup>13</sup> MERIDA & FLETCHER, *supra* note 2,2 at 175–76.

elites to avoid rolling up their sleeves and engaging in the difficult task of equipping the disadvantaged with the skills they need to succeed.

The third theme reflects, in my view, the genuineness of Justice Thomas's "window dressing" concern. Thomas is jealously protective of the kind of "back-to-basics" efforts that he believes will *actually* help the disadvantaged. His frustration with opponents of these efforts is palpable and reflected in several opinions that warn that decisions invalidating "back-to-basics" efforts will have devastating consequences for our most vulnerable citizens.<sup>14</sup>

## II. DIGNITY, NOT DEPENDENCE

Justice Thomas's optimistic belief in the inherent dignity and promise of all people, regardless of race or station, comes into the sharpest focus in opinions concerning the value and worthiness of majority-black educational institutions. Thomas flirted with radical black nationalism during his college years, and, as Stephen Smith's contribution to this symposium chronicles,<sup>15</sup> his jurisprudence continues to reflect a softer black nationalism—that is, a belief that African Americans need no special help to succeed. Along with the Myers Anderson bust, Justice Thomas's chambers features portraits of both Booker T. Washington and Frederick Douglass. Washington is arguably the founder of both black nationalism and black conservatism as political reform movements.<sup>16</sup> And Douglass believed that African Americans could, and would, succeed without special help from the white elite, as captured in his observation:

The American people have always been anxious to know what they shall do with us. . . . I have had but one answer

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<sup>14</sup> See *infra* Part IV.

<sup>15</sup> See Stephen F. Smith, *Clarence X?: The Black Nationalist Behind Justice Thomas's Constitutionalism*, 4 N.Y.U. J.L. & LIBERTY 583 (2009).

<sup>16</sup> Angela Onwuachi-Willig observes, "Although traces of black conservative thought can be found as far back as the 1700s, the most prominent historical figure among black conservatives is Booker T. Washington . . . ." Angela Onwuachi-Willig, *Just Another Brother on the SCT?: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. 931, 940 (2005).

from the beginning. Do nothing with us! Your doing with us has already played the mischief with us. . . . [I]f the Negro cannot stand on his own legs, let him fall . . . . All I ask is, give him a chance to stand on his own legs!<sup>17</sup>

Especially in opinions addressing the goal of racial integration in schools, discussed below, Justice Thomas endorses this sentiment, both by arguing that black children do not need to sit next to white children in order to learn and by demanding that his colleagues accord all-black institutions the respect that they deserve.

*A. Integration as a Remedy, Not an Aspiration*

In his integration opinions, Thomas repeatedly voices frustration with the unexamined belief that racial integration fosters academic achievement. As he recounts in his autobiography, *My Grandfather's Son*, he has long resisted the idea that integration is necessary for black achievement. He recalls discussing forced busing during the early 1970s with his grandfather:

Daddy and I were at loggerheads about most things, but we found ourselves in full agreement when it came to busing. Even in a segregated world, education was our sole road to true independence, and what mattered most was the quality of the education that black children received, not the color of the students sitting next to them. "Nobody ever learned anything on a bus," Daddy said.<sup>18</sup>

Thomas's unapologetic refusal to endorse racial integration as a goal *for its own sake* does not, as some commentators have suggested,<sup>19</sup> reflect

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<sup>17</sup> Frederick Douglass, *What the Black Man Wants: An Address Delivered in Boston, Massachusetts* (Jan. 26, 1865), in 4 *THE FREDERICK DOUGLASS PAPERS* 59, 68 (J. Blassingame & J. McKivigan eds., 1991), *quoted in* *Grutter v. Bollinger*, 539 U.S. 306, 349–50 (2003) (Thomas, J., concurring).

<sup>18</sup> THOMAS, *supra* note 4, at 104.

<sup>19</sup> See, e.g., Ellen Goodman, *Color Clarence Thomas Conservative*, SEATTLE TIMES, July 6, 2007; Clarence Lusane, *Clarence Thomas as "Judge Dread"*, BALTIMORE SUN, July 13, 1995,



callousness toward the needs of poor children languishing in substandard urban schools. Rather, he attributes the belief that integration will improve black academic achievement to assumptions about racial inferiority. "After all," he observed in *Missouri v. Jenkins*, "if integration . . . is the only way that blacks can receive a proper education, then there must be something inferior about blacks."<sup>20</sup>

Justice Thomas's conviction that the Equal Protection Clause only reaches state-enforced segregation, not mere "racial isolation," is therefore closely intertwined with his belief in black equality. Consider, for example, his concurring opinion in *Jenkins*. In *Jenkins*, the Court held that a federal district court had exceeded its equitable authority by ordering the Kansas City, Missouri School District to take steps to attract white suburban students to public schools in the majority-black district. Thomas's frustration with these efforts was clear. "It never ceases to amaze me," he began, "that the courts are so willing to assume that anything that is predominantly black must be inferior."<sup>21</sup> Not only is "there simply . . . no conclusive evidence that desegregation either has sparked a permanent jump in the achievement scores of black children, or has remedied any psychological feelings of inferiority black schoolchildren might have had,"<sup>22</sup> but, he argued, "there is no reason to think that black students cannot learn as well as when surrounded by members of their own race as when they are in an integrated environment."<sup>23</sup>

More recently, *Parents Involved in Community Schools v. Seattle School District*<sup>24</sup> presented Justice Thomas with the opportunity to confirm both his faith in the capacity of all-black schools to educate children and his conviction that African American school children need not share their classroom with white peers in order to learn. *Parents Involved in Community Schools* involved an Equal Protection challenge

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at 17A; Jared A. Levy, Note, *Blinking at Reality: The Implications of Justice Clarence Thomas's Influential Approach to Race and Education*, 78 B.U. L. REV. 575 (1998).

<sup>20</sup> *Missouri v. Jenkins*, 515 U.S. 70, 122 (1995) (Thomas, J., concurring).

<sup>21</sup> *Id.* at 114.

<sup>22</sup> *Id.* at 119 n.2.

<sup>23</sup> *Id.* at 121-22.

<sup>24</sup> 551 U.S. 701 (2006).

to the voluntary desegregation efforts of the Seattle and Louisville school districts. Although neither of the districts involved was legally obligated to undertake desegregation efforts to remedy past intentional segregation, both nonetheless employed racial classifications in school assignments.<sup>25</sup> Under these circumstances, the Supreme Court ruled that the districts were constitutionally precluded from employing "racial balancing" strategies.<sup>26</sup>

In his concurrence, Thomas elaborated on the views he articulated in *Jenkins*. First, although racial criteria may be employed in the context of a narrowly crafted court-ordered *remedy*, outside that context, the government is not permitted to "balance" the races because "[r]acial imbalance is not segregation."<sup>27</sup> Second, black students can learn and thrive in all-black environments. In fact, he argued, "it is far from apparent that coerced racial mixing has any educational benefits, much less that integration is necessary to black achievement."<sup>28</sup> Third, many all-black institutions have done, and continue to do, an admirable job of preparing black children to enter the competitive world. For example, Thomas noted, the Seattle School District itself "operates a K-8 'African-American Academy,'" with a "nonwhite enrollment of 99%."<sup>29</sup> Seattle not only founded the school as part of a district-wide effort to "increase academic achievement," but the experiment also appears to be working, as student test scores exceed their district peers "'across all grade levels in reading, writing and math."<sup>30</sup>

### *B. Respect for Institutional Diversity*

Justice Thomas's views on institutional diversity affirm his faith in and respect for the "little guy" in a different way. Thomas's conviction

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<sup>25</sup> One, the Seattle School District, had never been found to discriminate on the basis of race in school assignment; the other, the Louisville, Kentucky, School District, had been found by a federal court to have remedied the effects of past discrimination. *Id.*

<sup>26</sup> *Id.* at 730-31.

<sup>27</sup> *Id.* at 749 (Thomas, J., concurring).

<sup>28</sup> *Id.* at 761.

<sup>29</sup> *Id.* at 764 (internal quotation marks omitted).

<sup>30</sup> *Id.* (quoting AFRICAN AMERICAN ACADEMY, 2006 ANNUAL REPORT 2, [http://www.seattleschools.org/area/iso/test/anrep/anrep\\_2006/938.pdf](http://www.seattleschools.org/area/iso/test/anrep/anrep_2006/938.pdf)).

that the remedial power of federal courts is very limited lead him to conclude that intervention to dismantle all-black institutions is appropriate only to the extent that the institutions are the direct result of intentional discrimination. And, as the discussion above indicates, he believes that those who would go farther assume (consciously or unconsciously) that majority-black institutions are inherently inferior *because they are black*.

Thomas's opinions not only reject this view but also make clear that he values all-black institutions *as such*. He shares W.E.B. Du Bois's conviction that "We must rally to the defense of our schools. We must repudiate this unbearable assumption of the right to kill institutions unless they conform to one narrow standard."<sup>31</sup> He has, on several occasions, reminded his colleagues on the Court that African Americans responded to unjust laws excluding them from mainstream institutions by building quality institutions of their own. For example, in *Parents Involved in Community Schools*, Thomas observed that, even during the dark days of de jure segregation, many all-black public schools attained outstanding records of academic achievements.<sup>32</sup> In his estimation, these successes in the face of legal, social, and economic disadvantage are proof of the resilience of the human spirit.

But Thomas goes further. His protective stance toward institutions built in the face of adversity is motivated by more than a desire to remind the world of the resilience of the human spirit. Rather, he believes that institutions that developed despite (or, perhaps more accurately, because of) disadvantage not only *can* succeed at their appointed task of lifting up the poor and marginalized but might actually *do a better job* than institutions created by outsiders to "save" the disadvantaged. As he observed in *Jenkins*, "Because of their 'distinctive histories and traditions,' black schools can function as the

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<sup>31</sup> *United States v. Fordice*, 505 U.S. 717, 745 (1992) (Thomas, J., concurring) (quoting W.E.B. DU BOIS, *Schools*, in *THE CRISIS* 111, 112 (1917)).

<sup>32</sup> See *Parents Involved in Cmty. Sch.*, 551 U.S. at 763 (Thomas, J., concurring).

center and symbol of black communities, and provide examples of independent black leadership, success, and achievement.”<sup>33</sup>

In making this observation, Thomas quoted his opinion in *United States v. Fordice*, a case which addressed whether the State of Mississippi had taken sufficient steps to remedy past intentional desegregation in the higher education context. Mississippi had long maintained two systems of higher educational institutions—one white and one black—and the Court ruled that simply adopting and implementing race-neutral policies did not necessarily fulfill the state’s affirmative obligation to dismantle a prior *de jure* segregated system. Thomas joined in the Court’s opinion but wrote separately to emphasize, as he later would in *Jenkins* and *Parents Involved in Community Schools*, that the mere fact of racial imbalance in an educational institution does not violate the Equal Protection Clause. Echoing Du Bois, Thomas emphasized that the Court’s opinion did “not foreclose the possibility that there exists ‘sound educational justification’ for maintaining historically black colleges *as such*.”<sup>34</sup> On the contrary:

I think it undisputable that these institutions have succeeded in part because of their distinctive histories and traditions; for many, historically black colleges have become a symbol of the highest attainments of black culture. Obviously, a State cannot maintain such traditions by closing particular institutions . . . to particular racial groups. Nonetheless, it hardly follows that a State cannot operate a diverse assortment of institutions—including historically black institutions—open to all on a race-neutral basis, but with established traditions and programs that might disproportionately appeal to one race or another.<sup>35</sup>

In other words, the “sound educational justification” for supporting majority-black institutions might be related to the fact that the institutions are both successful *and black*. “It would be ironic,” he concluded,

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<sup>33</sup> *Missouri v. Jenkins*, 515 U.S. 70, 122 (1995) (Thomas, J., concurring) (quoting *Fordice*, 505 U.S. at 748 (1992) (Thomas, J., concurring)).

<sup>34</sup> *Fordice*, 505 U.S. at 748 (Thomas, J., concurring).

<sup>35</sup> *Id.* at 748–49 (citation and internal quotation marks omitted).

"if the institutions that sustained blacks during segregation were themselves destroyed in an effort to combat its vestiges."<sup>36</sup>

As Stephen Smith details in his contribution to this symposium,<sup>37</sup> in *Fordice*, Thomas defends traditionally black institutions on what might be called "black nationalist" grounds. These institutions are *ours*, he argues, and by respecting them, the Court accords us the respect that we deserve. His support for institutional diversity is also reflected in his concurring opinion in *Zelman v. Simmons-Harris*, the decision upholding the Ohio Pilot Scholarship Program against an Establishment Clause challenge.<sup>38</sup> This opinion is discussed in detail below, as it represents, I believe, one of the strongest examples Justice Thomas's unwavering support for the kind of "back-to-basics" efforts that he believes actually can help the disadvantaged. His *Zelman* concurrence, however, also is suggestive of his respect for educational pluralism. Repeatedly in the opinion, he observes that the private schools participating in school choice programs—many of which are both Roman Catholic and predominantly African American—do a better job at educating poor minority children than urban public schools. Their distinctive mission and character may well be, he hints, a reason for their success. This assumption is supported out in a substantial body of social-science literature, beginning with James Coleman's and Andrew Greeley's groundbreaking work demonstrating that the achievement of minority students in Catholic schools not only surpassed that of those in public schools but, moreover, that the differences were the greatest for the poorest, most disadvantaged, students.<sup>39</sup>

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<sup>36</sup> *Id.* at 749.

<sup>37</sup> See Stephen F. Smith, *Clarence X?: The Black Nationalist Behind Justice Thomas's Constitutionalism*, 4 N.Y.U. J.L. & LIBERTY 583, 598–99 (2009).

<sup>38</sup> 536 U.S. 639 (2002).

<sup>39</sup> See JAMES COLEMAN, THOMAS HOFFER & SALLY KILGORE, *HIGH SCHOOL ACHIEVEMENT* (1982); ANDREW M. GREELEY, *CATHOLIC HIGH SCHOOLS AND MINORITY STUDENTS* (2002); see also Derek Neal, *The Effect of Catholic Secondary Schooling on Educational Attainment* (Nat'l Bureau of Econ. Research, Working Paper No. 5353, 1995 (confirming the "Catholic School Effect")).

### III. NO EXPERIMENTATION OR WINDOW DRESSING

Justice Thomas's respect for historically black institutions stands in sharp contrast to his distrust of elite innovations designed to "save" the underprivileged. In *The Nine*, Jeffery Toobin asserts that, "Thomas believe[s] virtually all government efforts to help black people [wind] up backfiring."<sup>40</sup> Toobin's account may be descriptively accurate, but he fails to capture the reasons *why* Justice Thomas is such a skeptic, all of which relate to legitimate desires to help—and avoid doing harm. Thomas strenuously resists the suggestion that race or disadvantage provides license to conduct social experiments on those who lack the political clout to object. And he worries that many of the "experimental" programs favored by elite opinion, especially affirmative action, are mere "window dressing" that enable elites to feel good about themselves without undertaking the hard work needed to equip the disadvantaged with the tools that they need to succeed.

#### A. *The Sad Legacy of Experimentation*

In *My Grandfather's Son*, Justice Thomas describes his reaction to the early-1970s busing struggles in South Boston:

As I watched TV pictures of black children being bused into South Boston, it was clear that the situation had reached the point of total absurdity. . . . Aside from the threat of violence, the white schools in South Boston were at least as bad as the ones in black neighborhoods, so what was the point of shipping those children from one rotten school to another? . . . But once again blacks were being offered up as human sacrifices to the great god of theory, and I swore on the spot never to let Jamal go to a public school, even if I had to starve to pay his tuition. I had no intention of allowing my son to become a guinea pig in some harebrained social experiment.<sup>41</sup>

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<sup>40</sup> TOOBIN, *supra* note 55, at 108.

<sup>41</sup> THOMAS, *supra* note 4, at 78–79.

Thomas's personal response, as a young father, to the South Boston busing fiasco casts a new light on his observation, two decades later, in *Jenkins* that the "District Court has taken it upon itself to experiment with the education of the [district's] black youth."<sup>42</sup>

Thomas also harbors a suspicion that experimental programs instrumentalize the disadvantaged. That is, he worries that poor people, and especially racial minorities, frequently are targeted for ineffective social experimentation because they lack the political clout to say "no." This worry, again, is clearly informed by his history and personal experience. For example, during the urban renewal period, Thomas worried about the consequences of policies that replaced neighborhoods with "projects." "Aside from the oft-demonstrated incapacity of big government to solve our problems," he mused, "I feared that the unintended effects of social-engineering policies like urban renewal would be at least as bad as the problems themselves."<sup>43</sup> Four decades later, Justice Thomas was more fully informed about those unintended consequences when he confronted, in *Kelo v. New London*,<sup>44</sup> the efforts of New London, Connecticut, to use eminent domain to acquire private homes to promote comprehensive redevelopment—precisely the formula used during the urban renewal period. In a characteristically spirited dissent, Thomas argued that, properly understood, the Fifth Amendment's "public use" limitation prohibited the use of eminent domain for such purposes.<sup>45</sup> But he ended with an equally characteristic expression of concern about the unintended consequences of the Court's decision for the lives of the disadvantaged. "[T]he legacy of this Court's 'public purpose' test is an unhappy one," he noted, citing statistics that suggest that the overwhelming number of families displaced by urban renewal—a program known to detractors as "Negro removal"—were poor and predominantly minority.<sup>46</sup> Not only are poor people unable to put their

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<sup>42</sup> *Missouri v. Jenkins*, 515 U.S. 70, 114 (1995) (Thomas, J., concurring).

<sup>43</sup> THOMAS, *supra* note 4, at 147.

<sup>44</sup> *Kelo v. City of New London*, 545 U.S. 469 (2005).

<sup>45</sup> *Id.* at 506 (Thomas, J., dissenting).

<sup>46</sup> *Id.* at 522; see also BERNARD J. FRIEDEN & LYNN B. SAGALYN, DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES 27–30 (1989); Wendell Pritchett, *The "Public Menace" of Blight: Urban*

property to the "highest and best social use," he observed, but they "are also the least politically powerful."<sup>47</sup> As a result, he warned, "The consequences of today's decision are not difficult to predict, and promise to be harmful. . . . Allowing the government to take property solely for public purposes is bad enough, but extending the concept . . . to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities."<sup>48</sup>

### *B. Hard Work, Not Window Dressing*

Elsewhere, especially in his affirmative action opinions, Justice Thomas voices a related but distinct reason to disfavor "experimental" programs designed to benefit the poor and racial minorities *as such*. Thomas's opposition to affirmative action is widely known and generally attributed to a concern about the stigmatizing effects of preferential treatment. As Thomas observed in his dissenting opinion in *Grutter v. Bollinger*, he shares Frederick Douglass's conviction that "blacks can achieve in every avenue of American life without the meddling of university administrators."<sup>49</sup> He worries that preferential treatment signals that they have not, and could not, succeed without help.<sup>50</sup> But his opinion in *Grutter* makes clear a distinct concern about the systemic effects of programs that elevate a few privileged racial minorities to elite institutions. "It must be remembered," he asserted, "that the Law School's racial discrimination does nothing for those too poor or uneducated to participate in elite higher education and therefore presents only an illusory solution to the challenges facing our Nation."<sup>51</sup> The illusion is a dangerous one, Thomas fears, for it provides an excuse to avoid undertaking the hard work necessary to equip the underprivileged for success. Proponents of affirmative action, he argued in *Grutter*, care only about their "image[s]" among know-it-all elites, not solving real problems like the crisis of male

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*Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 47 (2003) ("In cities across the country, urban renewal came to be known as 'Negro removal.'").

<sup>47</sup> *Kelo*, 545 U.S. at 521 (Thomas, J., dissenting).

<sup>48</sup> *Id.*

<sup>49</sup> 539 U.S. 306, 350 (2003) (Thomas, J., concurring).

<sup>50</sup> See *id.* at 367-69.

<sup>51</sup> *Id.* at 355 n.3.



black underperformance.”<sup>52</sup> Therefore, they “will never address the real problems facing ‘underrepresented minorities,’ instead continuing their social experiments on other people’s children.”<sup>53</sup> Instead of affirmative action based upon race, which inevitably benefits the educationally privileged students who need help least, Thomas suggested arguably more radical alternatives, including class-based affirmative action that would “help[] those who are truly underprivileged.”<sup>54</sup>

#### IV. BACK TO BASICS

Justice Thomas’s *Grutter* opinion demonstrates that he does not believe in short cuts. He is a “back-to-basics” guy.<sup>55</sup> Thomas’s intellectual progression toward conservatism was profoundly influenced by Thomas Sowell’s book *Race and Economics*, in which Sowell observes:

Perhaps the greatest dilemma in the attempts to raise ethnic minority income is that those methods which have historically proved successful—self-reliance, work skills, education, business experience—are all slow developing, while those methods which are more direct and immediate—job quotas, charity, subsidies, preferential treatment—tend to undermine self-reliance and pride of achievement in the long run.<sup>56</sup>

Thomas made clear, in *My Grandfather’s Son* and elsewhere, that he attributes his success to “the basics” that Sowell identifies—

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<sup>52</sup> *Id.* at 372 n.11.

<sup>53</sup> *Id.* at 372 (footnote omitted).

<sup>54</sup> *Id.* at 355, n.3.

<sup>55</sup> This fact may explain, in part, his support for traditionally black colleges. While the intellectual pedigree of historically black colleges and universities is diverse—with many black leaders, including Du Bois, favoring a liberal arts model, and others, including Booker T. Washington, favoring industrial and technical training—both models were “traditionalist” in the sense that they aimed to equip African Americans with the tools needed to succeed in the world. See, e.g., Sean B. Seymore, *I’m Confused: How Can the Federal Government Promote Diversity in Higher Education Yet Continue to Strengthen Historically Black Colleges?*, 12 WASH. & LEE J. CIV. RTS. & SOC. JUST. 287, 295 (2006) (describing history and collecting sources).

<sup>56</sup> THOMAS SOWELL, *RACE AND ECONOMICS* 238 (1975), quoted in THOMAS, *supra* note 4, at 106.

specifically the discipline, order, and education provided by his grandfather and the nuns in Savannah.<sup>57</sup> He has also made clear that discipline, order, and education are, in his estimation, the building blocks of achievement sometimes lacking in the lives of the disadvantaged. This is not to suggest that Thomas believes that these tools guarantee achievement, but rather that he believes that a failure to equip the disadvantaged with these tools likely dooms them to failure.

The sincerity of Justice Thomas's "window dressing" concern—his worry that "experimental" programs merely bypass, rather than remedy, the real problems facing the disadvantaged—is, in my view, confirmed by his dogged defense of "back-to-basics" efforts embracing these building blocks of success. Nowhere is this defense clearer than in *Zelman v. Simmons-Harris*, the 2002 decision upholding the Ohio Pilot Scholarship Program against an Establishment Clause challenge.<sup>58</sup> The program provided poor Cleveland children with publicly funded scholarships enabling them to attend private schools, the vast majority of which were affiliated with the Roman Catholic Church. Justice Thomas, again, began his concurrence by quoting Douglass, this time on the importance of education: "[E]ducation . . . means emancipation. It means light and liberty. It means the uplifting of the soul of man into the glorious light of truth, the light by which men can only be made free."<sup>59</sup> He

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<sup>57</sup> See, e.g., FOSKETT, *supra* note 5 at 56–57, 65, 213; THOMAS, *supra* note , at 27 ("[I]t was not until long afterward that I grasped how profoundly Daddy, Aunt Tina, and the nuns of St. Benedict's had changed my life. Sometimes their strict rules chafed, but they also gave me a feeling of security, and above all they opened doors of opportunity."); Debra Cassens Weiss, *Justice Thomas: Americans Little Disposed to Sacrifice and Self-Denial*, A.B.A. J., Mar. 17, 2009 (discussing speech at Washington and Lee University); Wendy E. Long, *Bearing Witness*, CLAREMONT REV. OF BOOKS, Summer 2008, available at [http://www.claremont.org/publications/crb/id.1564/article\\_detail.asp#](http://www.claremont.org/publications/crb/id.1564/article_detail.asp#) ("Daddy's lessons in discipline, work habits, and self-denial[] formed Thomas's soul."); David B. Rivkin & Lee A. Casey, *Clarence Thomas: Mr. Constitution*, WALL ST. J., Mar. 22, 2008, at A25 (interviewing Thomas).

<sup>58</sup> 536 U.S. 639 (2002).

<sup>59</sup> *Id.* at 676 (Thomas, J., concurring) (quoting Frederick Douglass, *The Blessings of Liberty and Education: An Address Delivered in Manassas, Virginia* (Sept. 3, 1894), in 5 *THE FREDERICK DOUGLASS PAPERS* 623 (J. Blassingame & J. McKivigan eds., 1992)).

continued, “[M]any of our inner-city public schools deny emancipation to urban minority students.”<sup>60</sup>

After citing the Cleveland School District’s dismal academic record, Thomas observed that Pilot Scholarship Program empowered poor children to attend schools with established track records of successfully educating poor and minority students—schools not entirely unlike the Catholic schools that educated Clarence Thomas decades earlier. To say that Justice Thomas was frustrated with those who would deny children the opportunity the program provided in order to protect public schools from competition would be a gross understatement. Thomas reminded his colleagues of the Court’s prediction in *Brown v. Board of Education* that “it is doubtful that a child may be reasonably expected to succeed in life if he is denied the opportunity of an education.”<sup>61</sup> And, he admonished them, “[t]here would be a tragic irony in converting the *Fourteenth Amendment’s* guarantee of individual liberty into a prohibition on the exercise of educational choice.”<sup>62</sup>

Justice Thomas’s defense of school choice also reflected a respect for poor parents. As he made clear, one benefit of the Cleveland program was that it empowered parents to choose the schools that they believed would best serve their children. It is hardly surprising, he observed, that minority families consistently express high levels of support for school choice:

While the romanticized ideal of universal public education resonates with the cognoscenti who oppose vouchers, poor urban families just want the best education for their children. . . . The failure to provide education to poor urban children perpetuates a vicious cycle of poverty, dependence, criminality and alienation that continues for the remainder of their lives.<sup>63</sup>

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.* (quoting *Brown v. Board of Education*, 347 U.S. 483, 493 (1954)).

<sup>62</sup> *Id.* at 680 (emphasis in original).

<sup>63</sup> *Id.* at 682–83.

Thomas would not let opponents forget that, in contrast to the public schools that consistently fail poor children, "school choice programs . . . provide the greatest educational opportunities for . . . children in struggling communities."<sup>64</sup>

Outside of the race context, Justice Thomas's criminal law and criminal procedure opinions are perhaps most frequently used to build the case for his lack of concern for the little guy.<sup>65</sup> In my view, his record—for example, his defense of the jury trial and Confrontation-Clause rights of the accused and his strongly libertarian instincts in search and seizure cases<sup>66</sup>—arguably support the opposite conclusion. Those that assume otherwise may fail to understand that, for Thomas, a concern for the downtrodden clearly cannot legitimately translate into a reflexive support for criminal defendants in all instances. But I leave that debate for another day. Instead, I close by observing that, with the possible exception of *Zelman*, Justice Thomas's most direct and impassioned defense of the little guy is found in a criminal procedure opinion—his dissent in *City of Chicago v. Morales*.<sup>67</sup>

In *Morales*, the Court held that Chicago's gang loitering ordinance, which banned loitering in public spaces with members of criminal street gangs, was unconstitutionally vague. A plurality of the Court also suggested that the law ran afoul of "the freedom to loiter for innocent purposes."<sup>68</sup> Justice Thomas reacted strongly to both suggestions in an opinion that makes clear his perception that *Morales*, like

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<sup>64</sup> *Id.* at 682.

<sup>65</sup> See, e.g., Editorial, *The Youngest, Cruellest Justice*, N.Y. TIMES, Feb. 27, 1992, at A24; William Raspberry, *Confounding One's Supporters*, WASH. POST, Feb. 28, 1992, at A23.

<sup>66</sup> See *Kyllo v. United States*, 533 U.S. 27 (2001) (joined by Thomas, J.) (holding that use of heat sensing technology to detect marijuana production constituted "search" within meaning of Fourth Amendment); *Apprendi v. New Jersey*, 530 U.S. 466, 499 (2000) (Thomas, J., concurring) (arguing that the Sixth Amendment jury trial guarantee requires all elements of a crime be proved beyond a reasonable doubt to a jury); *Wilson v. Arkansas*, 514 U.S. 927 (1995) (authoring opinion holding that whether officers "knock and announce" their presence and authority before entering a dwelling is a factor to be considered in determining reasonableness of search); *White v. Illinois*, 502 U.S. 346, 358 (1992) (Thomas, J., concurring) (discussing the Confrontation Clause).

<sup>67</sup> 527 U.S. 41, 98 (1999) (Thomas, J., dissenting.).

<sup>68</sup> *Id.* at 53 (plurality opinion).

Zelman, was a "back-to-basics" case. He also made clear his view that that his colleagues' decision to invalidate the gang loitering law threatened to doom Chicago's most vulnerable residents to lives of terror and misery.<sup>69</sup>

Randall Kennedy has argued that *under-policing* is the most serious civil-rights issue facing poor African Americans.<sup>70</sup> Unquestionably, gangs, drugs, violence, and crime are all among the most serious quality of life issues facing many of our poorest citizens. And, in recent years, urban police forces have taken steps to address the problem of under-policing, in large part through "community policing" and "order maintenance policing" programs that prioritize disorder control and community-level problem solving.<sup>71</sup> The Chicago Gang Loitering Ordinance, at issue in *Morales*, was in keeping with these efforts. Thomas unquestionably sympathized with Kennedy's claim and with Chicago's effort to address it.

Justice Thomas's dissent focused, poignantly and emotionally, on the costs imposed by out-of-control crime, especially gang criminality, in our urban neighborhoods. "The human costs exacted by criminal street gangs are inestimable," he began.<sup>72</sup> He then cited

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<sup>69</sup> As an aside, it is worth noting that, as in the integration context, Justice Thomas's legal approach to the question before the Court—that is, whether the clause "to remain in any one place with no apparent purpose" was sufficiently precise—incorporated a demand that his colleagues respect the capacity of average people. In response to the plurality's suggesting that the law failed to give ordinary citizens adequate notice of what behavior was prohibited, Thomas scoffed, "The plurality underestimates the intellectual capacity of the citizens of Chicago." *Id.* at 114 (Thomas, J., dissenting).

<sup>70</sup> RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 29 (1997) ("Deliberately withholding protection against criminality . . . is one of the most destructive forms of oppression that has been visited upon African-Americans.").

<sup>71</sup> See, e.g., *COMMUNITY POLICING: RHETORIC OR REALITY* (Jack R. Greene & Stephen D. Mastrofski eds., 1986); GEORGE L. KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES* (1996); Dan M. Kahan, *Between Economics and Sociology: The New Path of Deterrence*, 95 MICH. L. REV. 2477 (1997); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997); Dan M. Kahan, *Social Norms, Social Meaning, and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609 (1998); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551 (1997); Tracey L. Meares & Dan M. Kahan, *Law and (Norms of) Order in the Inner City*, 32 LAW & SOC'Y REV. 805 (1998).

<sup>72</sup> *Morales*, 119 U.S. at 98 (Thomas, J., dissenting.).

numerous painful examples reflecting those costs—the Chicago Public School District’s decision to pay adults to walk elementary children to school because the youngsters were too afraid to leave home alone; “turf battles” on public streets with innocent-bystander victims; and, most powerfully, personal testimony before the Chicago City Council of residents favoring the effort to criminalize gang loitering. For example, he quoted eighty-eight-year-old Susan Mary Jackson, who testified:

We used to have a nice neighborhood. We don’t have it anymore. . . . I am scared to go out in the daytime. . . . [Y]ou can’t pass because they are standing. I am afraid to go to the store. I don’t go to the store because I am afraid. At my age if they look at me real hard, I be ready to holler.<sup>73</sup>

Another resident echoed Ms. Jackson, stating, “I have never had the terror that I feel when I walk down the streets of Chicago.”<sup>74</sup>

Not surprisingly, Justice Thomas’s legal analysis began with a plea for, and defense of, the basics. “As part of its ongoing effort to curb the deleterious effects of criminal street gangs, the citizens of Chicago sensibly decided to return to basics,”<sup>75</sup> he observed. The ordinance, he argued, simply confirmed “the well-established principle that the police have the duty and the power to maintain the public peace, and, when necessary, to disperse groups of individuals who threaten it.”<sup>76</sup> Thomas recognized that his colleagues were concerned about police abuse of authority, and he took care to note that he was not “overlook[ing] the *possibility* that a police officer, acting in bad faith, might enforce the ordinance in an arbitrary or discriminatory way.”<sup>77</sup> But, in his view, a prophylactic decision to invalidate the ordinance in order to avoid a risk of abuse not only was

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<sup>73</sup> *Id.* at 101 (alteration in original).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 101–02.

<sup>77</sup> *Id.* at 111.

constitutionally impermissible but also would unfairly hamstring Chicago's effort to improve the daily lives of poor Chicago residents.

His concluding words encompass each of the themes discussed in this essay: respect for the little guy, distrust of elites who would seek to protect him, and endorsement of a "back-to-basics" effort to give him the building blocks he needs to overcome disadvantage. And so, it is fitting to conclude this essay with Justice Thomas's own defense of the "little guy":

Today, the Court focuses extensively on the "rights" of gang members and their companions. It can safely do so—the people who will have to live with the consequences of today's opinion do not live in our neighborhoods. Rather, the people who will suffer from our lofty pronouncements are people like Ms. Susan Mary Jackson; people who have seen their neighborhoods literally destroyed by gangs and violence and drugs. They are good, decent people who must struggle to overcome their desperate situation, against all odds, in order to raise their families, earn a living, and remain good citizens. As one resident described, "There is only about maybe one or two percent of the people in the city causing these problems maybe, but it's keeping 98 percent of us in our houses and off the streets and afraid to shop." By focusing exclusively on the imagined "rights" of the two percent, the Court today has denied our most vulnerable citizens the very thing that [it] elevates above all else—the "freedom of movement."<sup>78</sup>

"And," he concluded, "that is a shame."<sup>79</sup>

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<sup>78</sup> *Id.* at 114–15 (citation omitted).

<sup>79</sup> *Id.*